COMMENT.

The case of *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288 (C. C. of A.) presents a new and novel aspect of the right of a patentee to sell his articles with restrictions on their use. Complainants manufactured certain machines for fastening buttons to shoes with metallic fasteners and sold them on condition that they should be used only with fasteners manufactured by them, title to revert upon breach of condition. The result was that complainants acquired the monopoly of the manufacture and sale of an unpatented article (the fastener itself), as their machine had superseded all others of the kind. Defendants manufactured and sold to the users of these machines fasteners intended to be used therein.

The court held that the buyers, as regards their right to use the machines, were mere licensees, and any use contrary to the condition would be not only a breach of contract but also an infringement (*Rubber Co.* v. *Goodyear*, 9 Wall. 788-90), and therefore it must follow that defendants were contributory infringers, as they were intentional aiders and abettors of the buyers. The same principle is here involved as in the intentional making and selling a necessary element of a combination patent (*Wallace* v. *Holmes*, 9 Blatchf. 65). But the real distinction between this case and that of *Morgan Envelope Co.* v. *Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, where the sale of rolls of paper (unpatented) adapted and intended to be used with complainants' mechanism for delivering them was held not to be an infringement, is that here an express contract of restriction was made.

The court also held that the condition was not void either as in restraint of trade or against public policy. That a monopoly of an unpatented article so created was only an incidental and therefore a legitimate result of complainants' lawful use of their monopoly of a patent; its life and extent would depend entirely on the merits of the patent. This case is essentially different from the telephone cases—*State* v. *Bell Tel. Co.*, 23 Fed. 539, and *State* v. *Del. & A. Tel. & Tel. Co.*, 47 Fed. 633, *Id.* 50 Fed. 677—where similar restrictions were held void, as telephone companies are charged with public duties and subject to regulation by law.

The question whether electric light companies are contemplated under the term "manufacturing industries," where such

industries are exempted from municipal taxation by the State Legislature was considered by the Court of Appeals of Maryland in the case of the *Frederick City Electric Light and Power Co.* v. *Mayer, etc., of Frederick City, et al.*, 36 Atl. Rep. 362. On February 4, 1891, the Mayor and Aldermen of Frederick passed an ordinance providing that the machinery and apparatus of all manufacturing industries established within the corporate limits of the city within a certain period from the passage of the ordinance should be exempt from taxation for a number of years. Whether an electric company could properly be said to "manufacture" electricity is immaterial. An ordinary, non-scientific citizen, such as the mayor and aldermen presumably were, in speaking of the advantages of his town would mention that it was lighted by electricity, but would scarcely include an electric plant among its "manufacturing industries." It could not be seriously contended that an electric plant connected with a private residence or a hotel should be exempt from taxation as a "manufacturing industry." The purpose of the ordinance was declared to be to encourage manufacturing industries to locate in the town, and there was no need of the advantage of exemption from taxation to induce an electric light company to locate in a place the size of Frederick. Where there is a reasonable doubt as to whether a certain concern was intended to be exempted from taxation, the doubt must be resolved in favor of the taxing power (60 Md. 280). The case of *People* v. *Wemple*, 129 N. Y. 543, 29 N. E. 808, held such concerns to be within the exemption of "manufacturing corporations;" but O'Brien, J., said, "the policy of the law must be considered, and should have great weight," and the legislature subsequently declared that they should not thereafter be deemed to be within the exemption. The case of *Com.* v. *Northern Electric Light & Power Co.*, 145 Pa. 105, 22 Atl. 839, was also decided by the same principle.

The force of the much discussed South Carolina Dispensary Act has been so largely destroyed by the recent decision of the Supreme court, in the case of *Scott* v. *Donald*, that the statute is now practically a nullity. The case is an important one, as it raises a constitutional question, the difficulty of which is shown by the frequent and numerous dissenting opinions in the many cases where similar questions have been considered. In the present case Mr. Justice Brown renders a strong dissenting opinion.

The case was brought to recover damages for the action of the defendant, a state constable, of South Carolina, in seizing, in

accordance with the Dispensary Act, several packages of wines and liquors belonging to the plaintiff and at the time of seizure in possession of a railway company which had brought the packages within the state. In reviewing the judgment of the United States Circuit Court, the Supreme Court holds that a state cannot prevent the private importation of spirituous liquors from another state, so long as it continues to recognize them as articles of lawful consumption and commerce. The ground upon which the court condemns those provisions of the statute affecting the plaintiff, is that they constitute an interference with interstate commerce. It is important to notice that the statute does not prohibit either the importation, manufacture or sale of intoxicating liquors; it merely turns these operations over to the state. Therefore the Supreme Court insists that such liquors must be regarded as the subject of foreign and interstate commerce, and that it is the duty of the Federal courts to afford such commerce the same measure of protection as is given to other articles of trade. By permitting only the state to import, "those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities."

The main ground upon which the defense sought to justify the statute was as an inspection act, and the act does, indeed, contain provisions looking to the ascertainment of the purity of liquors, but they do not redeem it from the charge of being an obstruction to commerce. In disposing of this point, the court upholds *Minnesota* v. *Barber*, 136 U. S. 313, and a large list of other cases involving questions of interstate commerce.

Mr. Justice Brown, in his dissenting opinion, considers the rulings in *Minnesota* v. *Barber* as having no considerable bearing upon the question; and contends that inasmuch as public sentiment favors some restriction of the sale of ardent spirits, the question of whether such restriction shall take the form of a license upon dealers, the total prohibition of the manufacture, or the assumption by the state government of the power to supply liquors, is a matter exclusively for the state to determine.